No. 46153-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

PEDRO GODINEZ JR.

REPLY BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

TABLE OF CONTENTS

Cases

II. The trial court committed reversible error by allowing Joanna Speaks to testify in jail clothing.

In his Brief of Appellant, Mr. Godinez assigned error to the fact that witness Joanna Speaks was required to testify in Jail clothing despite a timely objection from the defense. The trial court made no effort to weigh any potential security concerns and, from this record, there appear to have been none. Mr. Godinez assigned error to this decision, citing *State v Rodriguez*, 146 Wn.2d 260, 45 P 3d 541 (2002), which held that it is error to require a witness to testify in jail attire, but that the error was waived because the defense did not make a timely objection.

In its Brief of Respondent, the State acknowledges the case of *State v Rodriguez*, but attempts to distinguish it because the witness in *Rodriguez* was also shackled. This distinction is without merit. In *Rodriguez*, the Court cited extensively and approvingly to the case of *Estelle v. Williams*, 425 U.S. 50196 S Ct. 169148 L.Ed.2d 126 (1976). In *Estelle*, the defendant to appeared dressed in jail attire, without shackles, in his jury trial. The Supreme Court held this was error. The issue in both Estelle and Rodriguez is whether something about the defendant's clothing or appearance conveys to the jury that the witness' credibility is diminished. This could be solely jail attire (as in *Estelle*), solely shackles,

or both (as in *Rodriguez*). Cf. *State v. Finch*, 137 Wash 2d 792975 P.2d 967 (1999) (reversing death sentence for improper shackling). The decision of the trial court to require Ms. Speaks to testify in jail attire was error.

The State also argues that any error was harmless. In doing so, the State argues that the more lenient non-constitutional standard for harmless error should prevail. The State criticizes the defense for arguing "without citation to Washington authority" that the constitutional standard should apply. The constitutional standard requires reversal unless the error is harmless beyond a reasonable doubt

The *Rodriguez* case did not address the standard to be applied for harmless error because the Court concluded the defendant waived his right to raise the issue by not timely objecting. There is, therefore, no Washington case addressing this issue. The State, while criticizing the defense for failing to cite Washington authority, itself fails to cite *any* authority from any of the fifty states or federal circuit courts, for the proposition that the non-constitutional standard should apply.

In his Brief of Appellant, Mr. Godinez cited the case of *People v Bowman*, 93 N.E 2d 970 (Ill App 2012) for the proposition that the constitutional standard should apply *Bowman* is persuasive authority for

this issue in part because it relied on the the *Rodriguez* case from Washington. But that the constitutional standard applies can also be inferred from the Washington decisions interpreting *Estelle*. In *Finch*, the Court held that shackling is reversible error unless harmless beyond a reasonable doubt *Finch* at 859. See, also, *State v. Clark*, 143 Wn.2d 731, 775, 24 P.3d 1006 (2001); *State v. Damon*, 144 Wn.2d 686, 692-93, 25 P.3d 418 (2001). Additionally, the dissent in *Rodriguez*, which did not find the defense had waived the issue and, therefore, would have reached the issue of harmlessness, argued that the constitutional standard for harmlessness applies. See *Rodriguez* at 276 (Justice Sanders, dissenting).

Applying this standard, it cannot be said the error in allowing Ms. Speaks to testify in jail attire was harmless beyond a reasoanble doubt. The State's Brief suggests as much. In its Brief, the State points out Ms Speaks "did not implicate Godinez at all in this crime." Brief of Respondent, at 20. But, because she was "repeatedly impeached," her "overall lack of credibility rendered her testiony essentially neutral She neither helped nor hurt either side." Id, at 20-21. But this argument misses the essential point. Ms. Speaks was primarily a defense witness. Although she appeared on the witness list of on both parties, the State apparently was not intending to call her and the decision to call her in the State's case in chief was a last minute decision. RP, 100. Ms. Speaks'

credibility was central to the defense's theory of the case. Conceding that Ms. Speaks had some credibility issues that were pointed out by the State in its impeachment of her, there was no reason for the trial court to compound the credibility issues by forcing her to testify in jail attire. The error was not harmless beyond a reasoanble doubt

III. Mr. Godinez' offender score was improperly calculated due to the addition of one community custody point.

The State alleges Mr. Godinez was properly given one additional point to his offender score for being on community custody because he was being supervised by the Department of Corrections for a misdemeanor offense. The State criticizes the defense argument because there is no citation to "case law." But a proper citation to a statute makes reference to cases unnecessary.

The State misapprehends the meaning of "community custody" under the statute. "Community custody" means "that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department." RCW 9.94A.030(5) (emphasis added). Misdemeanants are not placed on community custody. Instead, they are

placed on probation. Former RCW 9.94A.501(1) outlines when the Department of Corrections should supervise misdemeanants. It reads:

> The department shall supervise every offender convicted prior to August 2, 2011, of a misdemeanor or gross misdemeanor offense who is sentenced to probation in superior court, pursuant to RCW 9.92.060, 9.95204, or 9.95.210, for an offense as provided in this subsection. The superior court shall order probation for offenders: [certain enumerated misdemeanors].

Department of Corrections probation for misdemeanor offenses is not the same as Department of Corrections community custody for felony offenses. Mr. Godinez was on probation for a misdemeanor and the trial court improperly calculated his offender score.

IV. Mr. Godinez' offenses constituted the same criminal conduct.

Two or more offenses constitute same criminal conduct when they require "the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589 (1)(a). In this case, all of the offenses involved the same victim. The State argues they

involved different criminal intent[1] and occurred at different times and places.

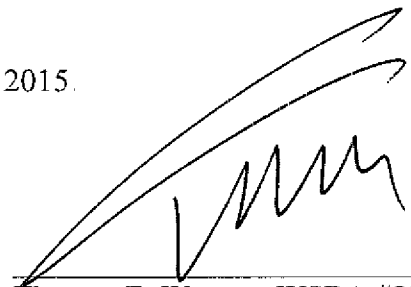
In assessing criminal intent, courts looks to the extent to which the criminal intent, when viewed objectively, changes from one crime to the next *State v Tili*, 139 Wn.2d 107, 122, 985 P 2d 365 (1999) As the trial court pointed out, the State's theory at trial on the kidnapping case was to commit bodily injury. RP 1238. Mr. Godinez' criminal intent did not change from the time of the kidnapping, when he acted with the intent to commit bodily injury, and the attempted murder, when he acted with the intent to shoot him

Additionally, although it is possible to see these offenses as occurring at separate times and places, a broader reading of the facts shows that the offenses were committed in one uninterrupted span of time and place. Mr. Godinez abducted Mr. Landstrom at Ms. Speaks'

[1] The State argues that Mr Godinez misrepresented the record when he stated in his Brief of Appellant that the trial court found the offenses kidnapping and attempted murder involved the same criminal intent. The State goes further and asserts this is a "plain and, apparently, intentional misrepresentation of the record." Brief of Respondent, at 24 It was never the intent of counsel to misrepresent the record The trial court started its analysis with the comment that "there is some overlap as to criminal intent." Later, it reiterated it was finding "some overlap in criminal intent, but find that they are not the same criminal intent, as argued by the State, the attempted murder is quite a different intent than that of kidnapping." RP, 1238-40 When counsel first read these sentences, he incorrectly believed that the Court was finding there was an overlap in the criminal intent and was rejecting the argument of the State that the intent was different. Upon a closer reading of the transcript, however, counsel now agrees with the State that the Court ultimately concluded they did not constitute the same criminal intent

residence and, in one uninterrupted movement, took him out to the woods to shoot him. The fact that this took about an hour does not change the fact that he was acting in an uninterrupted manner. The offenses occurred at the same time and place, with the same criminal intent, and this Court should find they constituted the same criminal conduct.

DATED this 5th day of May, 2015.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. PEDRO GODINEZ, Jr., Defendant.	Court of Appeals No.: 46153-6-II DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action, and:

On May 6, 2015, I e-filed the Reply Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and on that same date, a copy of said Brief was emailed to Clark County Prosecuting Attorney Anne Cruser through the Court of Appeals transmittal system.

On May 6, 2015, I deposited into the U.S. Mail, first class, postage prepaid, a copy of the Reply Brief of Appellant to the defendant:

Pedro Godinez, Jr., DOC #341908
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

////

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: May 6, 2015, at Bremerton, Washington.

Alisha Freeman

The Law Office of Thomas E Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

WEAVER LAW FIRM

May 06, 2015 - 12:25 PM

Transmittal Letter

Document Uploaded: 4-461536-Reply Brief.pdf

Case Name: State of WA v Pedro Godinez Jr.
Court of Appeals Case Number: 46153-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Thomas E Weaver - Email: admin@tomweaverlaw.com

A copy of this document has been emailed to the following addresses:

Anne.cruser@Clark.wa.gov